IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 13, 2008

DERRICK SAWYERS v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Wayne County
No. 13738 Robert Holloway, Judge

No. M2007-01598-CCA-R3-HC - Filed July 24, 2008

The petitioner, Derrick Sawyers appeals the habeas court's denial of habeas corpus relief. Following our review of the record and applicable law, we affirm the court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

M. Wallace Coleman, Jr., Lawrenceburg, Tennessee, for the appellant, Derrick Sawyers.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; T. T. Michel Bottoms, District Attorney General; and Joel Douglas Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This is an appeal from the habeas court's order denying the petitioner habeas corpus relief. The court denied the petitioner's petition after a hearing because the proof showed that the petitioner was not restrained of his liberty by reason of the challenged convictions. According to the appellate record, the following events took place:

> August 19, 1995, Petitioner sold less than .5 grams cocaine (case 1).
> August 19, 1995, Petitioner arrested and released on bond (in case 1).
> November 28, 1995, Petitioner possessed cocaine for resale (case 2).
> November 29, 1995, Petitioner arrested and released on bond (in case 2).
> January 13, 1996, Petitioner committed second degree murder (case 3).

Derrick Sawyers v. State, No. M2006-00607-CCA-R3-HC, 2007 WL 152230, *1 (Tenn. Crim. App., at Nashville, Jan. 16, 2007). In September 27, 1996, petitioner pled guilty (cases 1, 2, and 3) wherein he received a total effective sentence of twenty-eight years. The sentences imposed in the three cases were as follows:

Case 1: Three years, concurrent with case 2; consecutive to case 3.
Case 2: Eight years, concurrent with cases 1 and 3.
Case 3: Twenty-five years, consecutive to case 1; concurrent with case 2.

See id. According to the record, the petitioner filed his third petition for habeas corpus relief on March 22, 2005. In this petition, the petitioner alleged for the first time that he was free on bond when he committed the offenses in cases 2 and 3, and for this reason, the trial court was constrained to order the sentences in those cases to run consecutively to each other and to the sentence imposed in case 1.[1] On January 31, 2006, the habeas court dismissed the petition, finding that the petitioner was not entitled to habeas corpus relief because the petitioner had already served his eight-year sentence (case 2) and was no longer restrained of his liberty. The petitioner appealed to this court. After an extensive analysis on appeal, this court found that the record clearly established that the petitioner was free on bail when he committed the offense in case 2 and was again free on bail when he committed the offense in case 3. This court then made the following conclusions:

> Initially, we note distinctions between *McLaney* and the present case that clutter our path to a solution in the latter. First, although the sentences in both cases were the products of global plea agreements that respectively encompassed all sentences affected by the concurrent sentencing schemes, in *McLaney* the breach of mandatory consecutive sentencing provisions occurred only once because there was only one pre-bail offense and one set of post-bail offenses. In the present case, however, the petitioner complains of sequential breaches: the concurrent alignment of the case-1 sentence with that of case 2 and the concurrent alignment of the case-2 sentence with that of case 3. Second, in adjudicating the alignment of only two sentences, the *McLaney* court dealt with fully reciprocal concurrent sentences. In the

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[1] Tennessee Code Annotated section 40-20-111(b) states:

> In any case in which a defendant commits a felony while the defendant was released on bail in accordance with the provisions of chapter 11, part 1 of this title, and the defendant is convicted of both offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that the sentences be served cumulatively.

Also, Tennessee Rule of Criminal Procedure 32(c)(3)(C) provides:

> When a defendant is convicted of multiple offenses from one trial or when the defendant has additional sentences not yet fully served as the result of convictions in the same or other courts and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply: (C) to a sentence for a felony committed while the defendant was released on bail and the defendant is convicted of both offenses.

present case, however, the case-2 sentence runs concurrently with both the case-1 and case-3 sentences, but the case-1 and case-3 sentences run consecutively to each other.

These factual permutations are more perplexing because of a possible conflict of rules of law. On the one hand, *Hickman* and *Benson* undergird the habeas corpus court's ruling because the one sentence in the present case that is appended to the other two by concurrent alignments is the eight-year sentence in case 2, which for purposes of analysis, expired before the habeas corpus petition was filed. The arguable result of applying *Hickman* and *Benson* is that the petitioner is no longer restrained of his liberty by virtue of the case-2 sentence and that, accordingly, the case-2 sentence with its concurrent appendages must be ignored for purposes of habeas corpus relief. On the other hand, *McLaney* arguably instructs that, not only are the sentences that violate the mandatory consecutive sentencing provisions void in the inception, but the violations taint any and all sentences via impermissible concurrent alignments. In this view, all three of the current petitioner's sentences-and not just the case-2 sentence-are corrupted by the improper plea agreement for concurrent alignment.

. . . .

In our view, the case at hand requires close attention to the facts and surgical application of the various rules we have discussed.

In *Smith v. Lewis*, 202 S.W.3d 124 (Tenn. 2006), our supreme court adjudicated Smith's habeas corpus claim that his single sentence for rape of a child was illegal because the judgment, as amended, ignored legislative mandate by providing for release from prison upon serving 85 percent of his sentence instead of requiring confinement for the mandated 100 percent. *Id*. at 125-26. Responding to and rejecting the State's "ripeness" argument that Smith could not seek habeas corpus relief until the petitioner had served 85 percent of his sentence, the supreme court said, "The illegal and void character of the sentence inhered upon its entry: it will not spring into being only after Smith has served eighty-five percent of his sentence." *Id*. at 128. Applying this principle from *Smith*, the illegal nature of the concurrent alignment of sentences in the current petitioner's global plea agreement rendered the sentences void ab initio. FN1

> FN1. We acknowledge that, in *Smith*, our supreme court was not addressing a claim of a lack of restraint of liberty when it stated that the "illegal and void character of the sentence inhered upon its entry." Indeed, the *Smith* court was responding to a claim that the habeas corpus attack was not yet ripe-something quite the opposite from the *Hickman* principle that the petitioner is ineligible because the sentence has been served and has expired.

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That said, we do not believe that the habeas corpus court doubted that the case-2 sentence was void; yet, the court denied relief based upon the requirement that a petitioner must be restrained of his liberty by the judgment under attack. *We agree that the requirement-essentially a requirement of standing to bring an action in habeas corpus-apparently operates independently of the merits of the substantive claim of voidness*. *See Benson*, 153 S.W. 3d at 31 ("A statutory prerequisite for *eligibility* to seek habeas corpus relief is that the petitioner must be 'imprisoned or restrained of liberty' by the challenged convictions.") (emphasis added).

For instance, the petitioner in *Benson* claimed that at least two of his 1993, guilty-pleaded felony convictions resulted in void sentences because he was free on bond for a felony when he committed the new offenses. *Benson*, 153 S.W.3d at 30. Still, the high court ruled that, "as in *Hickman*, the petitioner [Benson] is not currently imprisoned or restrained of liberty by the challenged convictions." *Id*. at 32. Similarly, in *Jubal Carson*, a panel of this court adjudicated a claim that Carson's 1992 Blount County convictions emanated from offenses committed while he was an escapee, and that pursuant to Tennessee Rule of Criminal Procedure 32(c)(3), the 1992 sentences should have been aligned consecutively to the sentence for the escape conviction. *Jubal Carson*, slip op. at 5; *see* Tenn. R. Crim. P. 32(c)(3) (providing bases for mandatory consecutive sentencing, including "for a felony committed while on escape"). This court observed that the 1992 sentences, combined, yielded an effective sentence of five years and that this "effective five-year Blount County sentence had expired before the petition was filed." *Jubal Carson*, slip op. at 5. As a result, Carson was not entitled to challenge the 1992 Blount County convictions via a writ of habeas corpus. *Id*.; *see Robert L. Moore v. Glenn Turner*, No. W2005-01995-CCA-R3-HC, slip op. at 3 (Tenn. Crim. App., Jackson, Feb. 28, 2006) (holding that, despite habeas corpus petitioner's claim that his sentences for 1991 offenses violated *McLaney*, the sentences had expired, with the result that the petitioner was no longer restrained of liberty for purposes of habeas corpus relief); *Terry Lee Clifton v. State*, No. W2004-01385-CCA-R3-HC, slip op. at 5-6 (Tenn. Crim. App., Jackson, June 9, 2005) (rejecting habeas corpus bid to attack *McLaney*-infirm convictions because the sentences on those convictions had been served and had expired), *perm. app. denied* (Tenn. 2005). Thus, despite that the challenged judgment may be void, a person who is not under restraint of the judgment for purposes of the habeas corpus statute is ineligible to seek habeas corpus relief from that judgment. *Cf. Hickman*, 153 S.W.3d at 27 (finding that "[a]dditional information outside the judgment would be needed to establish that Hickman in fact was not represented by counsel"; accordingly, not only was Hickman no longer under restraint of the challenged judgment, but because "additional proof" was required, the judgment was at "most voidable, rather than void").

Accordingly, we believe that the habeas corpus court was on solid ground in applying *Hickman* to bar the habeas corpus actions if the eight-year, case-2 sentence had expired. *If the petitioner were no longer under the restraint of that sentence-regardless whether it was void in the inception, the petitioner lacked standing to challenge that sentence.* It does not necessarily follow, however, that a threshold bar to challenging the case-2 sentence is ipso facto broad enough to preclude challenges to the other sentences. In other words, even if we disqualify the attack on the case-2 sentence, must we still recognize that the sentences in cases 1 and 3 were also beset by an improper concurrent sentencing scheme? FN2.

> FN2. To facilitate discussion, we refer to the three-year sentence in case 1 as if it, as well as the case-2 sentence, had expired, although we cannot discern from the record whether it was served prior to the consecutive 25-year sentence in case 3. If, in fact, the case-1 sentence was not served before the case-3 sentence, it would not have expired and would be in the same legal posture as the case-3 sentence for habeas corpus purposes.

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We answer this last question in the affirmative. We mentioned in the introduction that the present case is unique from others that we have encountered because of the three sets of convictions and the tiered or sequential triggering of the mandatory consecutive sentencing provisions. The distinction is significant. In the *Hickman*-type dismissal cases, the second and *most recent set* of convictions had expired, leaving the habeas corpus court with nothing to further adjudicate. *See, e.g.*, *Benson, Jubal Carson, Robert L. Moore, Terry Lee Clifton*. In the present case, however, although the sentence in case 2 has expired, the longer, more recent murder sentence in case 3, at least, is still extant, and the petitioner is still under the restraint of that sentence. That sentence was originally imposed with an improper concurrent alignment feature.

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At first blush, it may appear that *McLaney* requires that we afford the petitioner relief. FN3. We conclude, however, that *McLaney* itself is serviceable in supporting the habeas corpus court's ruling despite our finding that at least one of the sentences is challengeable as illegal. The *McLaney* court noted that McLaney "entered his guilty plea in exchange for a concurrent sentence which was, in actuality, illegal." The court then remarked, "'There can be little doubt that a guilty plea entered pursuant to a plea bargain which promises a concurrent sentence must be set aside *where the promise of concurrenc[e] is not fulfilled*.'" *McLaney*, 59 S.W.3d at

95 (emphasis added) (quoting *West Virginia ex rel. Morris v. Mohn*, 165 W. Va. 145, 152, 267 S.E.2d 443, 448 (1980)). By this language, our supreme court, *in its discussion of remedy*, identified and expressed its concern with the plight of a petitioner who was *denied the benefit* of his plea bargain-possibly because the Department of Correction did not implement the trial court's illegal sentencing terms. *See generally, e.g., Mark A. Percy v. Tennessee Department of Correction*, No. M2001-01629-COA-R3-CV, slip op. at 2-4 (Tenn. Ct. App., Nashville, Feb. 26, 2003).

> FN3. Based upon the allegation that McLaney's second felony offense occurred while he was free on bail for the first felony offense, our supreme court concluded that, should the face of the record support the allegation, the concurrent sentencing scheme would have been illegal and void. *McLaney*, 59 S.W.3d at 94. The court remanded the case to the habeas corpus court for resolution of the factual issue whether McLaney was free on bail when he committed the second offense. *Id*. at 95. In the present case, however, the habeas corpus court has already scoured the record and adjudicated that the petitioner was, in fact, free on bail when he committed the offense in case 2 and was again free on bail when he committed the offense in case 3. If we were to grant the present petitioner relief pursuant to *McLaney, McLaney* would then require that we vacate the case-3 sentence and remand to the habeas corpus court for a determination whether, based upon the Department of Correction's sequencing of the consecutive sentences, the case-1 sentence ran first and expired. Ultimately, the vacated case-3 judgment and, if applicable, the vacated case-1 judgment would be transferred by the habeas corpus court to the original trial court, which would afford the parties an opportunity to reach a new plea agreement or, otherwise, to allow the petitioner to withdraw his 1996 pleas. *See id.* at 94-95.

In the present case, the habeas corpus court found that the petitioner's eight-year, case-2 sentence actually ran concurrently with the other sentences and has, accordingly, expired. Thus, the court stated that the "promise of concurrenc[e] has been fulfilled." If the record before us supported that finding of fact, we would agree that the petitioner would have received the benefit of his bargain.

Viscerally, we sense no injustice to the petitioner by reason of his plea agreement, and we are loath to mechanistically vacate any of the petitioner's sentences, knowing that the rote application of "reason without conscience might become trickery, or even downright knavery." H. Gibson, Gibson's Suits in Chancery § 67 (5th ed. 1955). FN4. The petitioner voices a hollow complaint that, if exploited, might result in "outright knavery." We hold that the "fulfillment of the

promise of concurrenc[e]," in effect, purges the judgment in case 3 (and, if need be, in case 1) of the contaminating reference(s) to concurrent sentencing.

> FN4. In his treatise, Professor Gibson refers to the maxim, "Judex habere debet duos sales, salem sapientae ne sit insipidus et salem conscientiae ne sit diabolus. (A Judge ought to have two salts, the salt of wisdom that he may do nothing foolish, and the salt of conscience that he may do nothing wicked.)." Gibson, supra, at § 67 n. 82.

The problem before us ultimately, however, is that the record does not reflect whether the Department of Correction honored the judgments' concurrent alignment of the eight-year, case-2 sentence with the other sentences. In that situation, the habeas corpus court's finding that the case-2 sentence had expired is not supported in this record. Thus, although such a finding would, in our view, justify a dismissal of the habeas corpus petition relative to all convictions, we must vacate the habeas corpus court's order as it stands and remand the case for an appropriate inquiry and finding whether the eight-year, case-2 sentence has, in fact, expired.

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Although the legal principles we have analyzed would support the habeas corpus court's ruling had that court's underlying findings been supported in the record, no factual support of the ruling exists in the record, and the cause must be remanded for an apt inquiry and finding of fact.

Derrick Sawyers, 2007 WL 152230, at *4-7 (emphasis added).

As noted, this court remanded the case to determine whether or not the eight-year (case-2) sentence had expired. Upon remand, a hearing was held pursuant to this court's directive to determine the status of the petitioner's eight-year sentence. At the hearing, the state voiced its intent of proving the expiration of the petitioner's eight-year sentence through the testimony of Candice Whisman, The Director of Sentence Management Services with the Tennessee Department of Corrections (TDOC). The petitioner, through counsel, objected and argued that the recent decision of *Summers v. State*, 212 S.W.3d 251 (Tenn. 2007) precluded any extraneous evidence regarding the petitioner's sentences from being introduced into the record. In response, the court overruled the petitioner's objection, finding that this court had remanded the petitioner's case with instructions to make a finding of fact as to the expiration of the petitioner's eight-year sentence. Director Whisman then testified at the hearing. According to her testimony, TDOC records showed that the petitioner's eight-year sentence was treated by TDOC as a stand-alone sentence and the sentence had expired on December 19, 2002.

On June 19, 2007, the circuit court entered an order denying the petitioner habeas corpus relief. The court found that although the "[petitioner] is still imprisoned, he is not currently

restrained of his liberty as a direct consequence of the eight-year sentence, even if that sentence is illegal, since that sentence has in fact been fully served and has expired." The petitioner appealed.

ANALYSIS

The determination of whether to grant relief upon review of a petition for habeas corpus is a question of law. *Hart v. State*, 21 S.W.3d. 901, 903 (Tenn. 2000). Accordingly, review is de novo with no presumption of correctness given to the findings of the lower court. *Hogan v. Mills*, 168 S.W.3d 753, 755 (Tenn. 2005).

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Tennessee Code Annotated sections 29-21-101 through 29-21-130 codify the applicable procedures for seeking a writ. However, the grounds upon which a writ of habeas corpus may be issued are very narrow. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record of the proceedings upon which the judgment was rendered that a court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *See Summers*, 212 S.W.3d at 255; *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993). The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. *Archer*, 851 S.W.2d at 163. A void judgment is a facially invalid judgment, clearly showing that a court did not have statutory authority to render such judgment; whereas, a voidable judgment is facially valid, requiring proof beyond the face of the record or judgment to establish its invalidity. *See Taylor*, 995 S.W.2d at 83. The burden is on the petitioner to establish by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). *See also Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004).

In this appeal, the petitioner asserts that the habeas court erroneously applied the principles of law outlined in *McLaney v. Bell* and *Summers v. State* and improperly found that the petitioner was not entitled to habeas corpus relief because he was not currently restrained of his liberty as a direct consequence of his illegal eight-year sentence. The petitioner complains that the record proves that his sentences derived from his global plea agreement were illegal and void which rendered the entire plea agreement invalid.

At the onset of our review, we note that we have already exhaustively analyzed *McLaney* in juxtaposition with *Hickman* and other cases and determined that *McLaney* does not necessarily mandate relief in this case. Furthermore, it is our view that the *Summers* decision did not preclude the habeas court from finding that the petitioner was not entitled to relief because the petitioner's eight-year sentence had expired.

Similar to the instant case, the petitioner in *Summers* complained that his concurrent sentence for misdemeanor escape was illegal because it directly contravened a statute, which required consecutive sentencing in such circumstances. *Summers*, 212 S.W.3d at 255. Of significance to this case, our supreme court reiterated the well-settled principles espoused in *Hickman* that:

> To obtain habeas corpus relief, a petitioner must be "imprisoned or restrained of liberty. . . . However, a petitioner is not restrained of liberty unless the challenged judgment itself imposes a restraint on the petitioner's freedom of action or movement. *Habeas corpus relief does not lie to address a conviction after the sentence on the conviction has been fully served*.

Id. at 257 (citations omitted) (emphasis added). Interestingly, however, the supreme court refused to accept the state's invitation to consider the petitioner's argument regarding the illegality of his misdemeanor sentence "moot" even though the petitioner had served thirteen years of his effective forty-year sentence. In making this determination, the supreme court reasoned:

> [S]ummers' effective forty-year sentence has not been served and has not expired. The Department of Correction could attempt to require Summers to serve his sentence for escape at the expiration of his other sentences. *See State v. Burkhart*, 566 S.W.2d 871, 872 (Tenn. 1978). *Nothing in the record eliminates that possibility*. We therefore decline to view any illegality in the escape sentence as moot.

Id. at 258 (emphasis added).

In its order denying the petitioner relief, the habeas court found that the petitioner's case was distinguishable from *Summers v. State*. We find the habeas court's analysis well-reasoned and recite it as follows:

> The concern expressed by the Court in *Summers* has been eliminated here with the testimony of Ms. Whisman and the records of the Department of Corrections. The promise of concurrence has been fulfilled, and the [case 2] eight-year sentence has expired. This record is clear and conclusive that the possibility that the Department of Corrections might require [the petitioner] to serve the eight-year sentence at the end of his twenty-eight year sentence has been eliminated. Although [the petitioner] is still imprisoned, he is not currently restrained of his liberty as a direct consequence of the eight-year [case 2] sentence, even if that sentence was illegal, since that sentence has been fully served and has expired. . . . [The petitioner] is not entitled to habeas corpus relief.

We agree with the habeas court's analysis and conclusion. To reiterate, a person is not "restrained of liberty" for purposes of the habeas corpus statute unless the challenged judgment itself imposes a restraint upon the petitioner's freedom of action or movement. *Hickman*, 153 S.W.3d at 24. Under the unique facts of this case, the record fully supports the habeas court's finding that the petitioner's eight-year (case 2) sentence complained of was served and expired. As such, the petitioner is not entitled to relief vis a vis the expired sentence, and the habeas court properly denied habeas corpus relief.

CONCLUSION

For the aforementioned reasons, the petitioner is not entitled to relief on his habeas corpus claim.

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J.C. McLIN, JUDGE